



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

In re:

ORANGE COUNTY NURSERY, INC.,
a California Corporation

Debtor(s) .

Case No.: 6:15-bk-12078 MJ

CHAPTER 11

MEMORANDUM OF DECISION IN
SUPPORT OF ISSUANCE OF STAY
PENDING APPEAL

[No hearing required]

INTRODUCTION

The court has filed the Fourth Amended Plan of Reorganization (As Modified) and entered its final orders in this case, including the Order Confirming Fourth Amended Plan of Reorganization (As Modified) and the Order Allowing the Claim of the Minority Voting Trust. The Debtor, Orange County Nursery (OCN), controlled by the

1 Majority shareholders, filed its Notice of Appeal of those orders
2 and requested a certification for a direct appeal to the Ninth
3 Circuit. Concurrently with this Memorandum and Order Issuing Stay
4 Pending Appeal, the court is also filing the Certification for
5 Direct Appeal to the Ninth Circuit.
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7 At a hearing on April 4, 2017, regarding the modifications to
8 the Fourth Amended Plan which needed to be made in accordance with
9 the court's Memorandum of Decision re Treatment of the Minority
10 Voting Trust's Claim and Modifications to Chapter 11 Plan, the
11 Debtor raised issues regarding how certain provisions in the plan
12 would be implemented while an appeal of the confirmation order was
13 pending. The court construed Debtor's comments as a premature¹
14 request for a stay pending appeal. Because the court had already
15 determined that it would issue a stay pending appeal when the
16 anticipated appeals were filed, it notified the parties during the
17 April 4 hearing that it would issue a stay once the Notice of
18 Appeal was filed. Therefore, the Order Imposing Stay Pending
19 Appeal is entered based both on the oral motion of the Debtor and
20 on the court's own violation. This Memorandum sets forth the
21 reasoning behind the issuance of the stay.²
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26 ¹ Premature in the sense that at that time no orders had been entered and no notice of appeal filed.

27 ² During a further hearing regarding plan issues on May 4, 2017, the attorneys for MVT inquired again about
28 the court's intention regarding a stay pending appeal. The court confirmed its intention to issue a stay but advised
MVT attorneys they could file a written argument against issuance of the stay by May 15, 2017. They did not file any
written opposition

DISCUSSION

The factors to be considered in determining whether to issue a stay pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v Holder, 556 U.S. 418, 434 (2009); See also Indiana State Police Pension Trust v Chrysler LLC, 556 U.S. 960 (2009); McDermott v Ampersand Pub., LLC, 559 F.3d 950, 957 (9th Cir. 2010), citing Winter v Natural Res. Def. Council, 555 U.S. 7, 20-22 (2008).

'A stay is not a matter of right, even if irreparable injury might otherwise result.' Virginian R. Co., 272 U.S., at 672, 47 S. Ct. 222. It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.' Id., at 672-673, 47 S. Ct. 222; see Hilton, supra, at 777, 107 S. Ct. 2113 ('[T]he traditional stay factors contemplate individualized judgments in each case'). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. Nken v Holder, 556 U.S. at 433-34.

The Supreme Court in Nken emphasized that no matter how

1 overwhelming the findings on one of the four factors, a court must
2 find the party requesting a stay had satisfied, more than
3 minimally, all of the factors. ("[M]ore than a mere 'possibility'
4 of relief is required." Id. at 434-35.) Prior to Nken, the Ninth
5 Circuit had developed a line of cases which held that once
6 irreparable harm was shown, a sliding scale can apply to the other
7 three factors.

9 Petitioner must show either a probability of success on the
10 merits and the possibility of irreparable injury, or that
11 serious legal questions are raised and the balance of
12 hardships tips sharply in petitioner's favor. These
13 standards represent the outer extremes of a continuum, with
14 the relative hardships to the parties providing the critical
15 element in determining at what point on the continuum a stay
16 pending review is justified.

18 Abbassi v INS, 143 F. 3d 513, 514 (9th Cir. 1998).

19 Although it acknowledged the holding of Nken, the Ninth
20 Circuit in two later cases held that the balancing test/sliding
21 scale of Abbassi was not abrogated entirely. In Alliance for the
22 Wild Rockies v Cottrell, 632 F. 3d 1127 (9th Cir. 2011), the court
23 held that although the Supreme Court had raised the bar on what
24 must be shown on the irreparable harm prong to justify a stay, it
25 did not alter a court's authority to balance the elements of the
26 four-prong test, so long as a certain threshold showing is made on
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1 each factor. Id. at 1131-32. A different panel of the same court
2 in Leiva-Perez v Holder, 940 F. 3d 962 (9th Cir. 2011) confirmed
3 that Abbassi was alive and well and that a serious question going
4 to the merits was sufficient to satisfy the first prong of the
5 test so long as the balance of all factors favored issuance of a
6 stay. Id. at 966-67.
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8 Keeping in mind that the existence of a serious legal
9 question is sufficient to satisfy the likelihood of success on the
10 merits prong, this court analyzes why a stay in this case pending
11 Debtor's appeal to the Ninth Circuit is appropriate. After it
12 valued the equity in Debtor on the petition date and from that
13 valuation determined the monetary value of MVT's claim, findings
14 subject to a clearly erroneous standard of review on appeal and
15 unlikely to be overturned, the court then was required to
16 determine how MVT's claim should be treated in the chapter 11
17 plan. This second ruling, which is captured in the Fourth Amended
18 Plan of Reorganization (As Modified) and the Order Allowing the
19 Claim of the Minority Voting Trust, required the interpretation of
20 legal principles, a ruling normally subject to de novo review by
21 an appellate court. Moreover, this court's ultimate ruling on the
22 treatment of the claim was premised on two prior District Court
23 Orders re Bankruptcy Appeal, which had reversed on legal grounds
24 earlier rulings of this court. As a consequence, there is a high
25 likelihood that the circuit court's review of the bankruptcy
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1 court's rulings will be de novo, a standard of review more likely
2 to result in reversal than clear error.

3 In addition to the standard the circuit will utilize is the
4 substance of this court's ruling, which was unique and had no
5 pertinent case law precedent to support its determinations. The
6 Ratable Redistribution of the shares of the Debtor on the
7 Effective Date of the Plan certainly raises a "serious legal
8 question" as to its propriety. As the trial court, this court is
9 unable to make a call on the likelihood Debtor will overturn the
10 equitable determination this court has made, done after
11 considerable deliberation and in light of the District Court
12 rulings which controlled its decision. It seems fair to say
13 reversal is more than a remote possibility. But it seems even
14 more clear that the appeal raises serious legal questions,
15 satisfying the first prong.

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17 The second and third factors are logically considered
18 together, particularly in light of the balancing test the court
19 must conduct. This court's ruling would have a substantial,
20 perhaps devastating impact on the Majority and perhaps on Debtor,
21 as it would turn the controlling ownership upside down. Those not
22 in control before, MVT, would control the board as majority and
23 the prior controlling owners would be relegated to second chair.
24 Once that switch is implemented, its effect will be irreparable to
25 the majority. On the flip side, although MVT has waited almost
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1 ten years since it commenced its corporate dissolution action in
2 state court to either gain control of OCN or be paid the 2009
3 monetary value of its ownership interest, waiting a bit longer
4 will be just that - a wait - without a substantial daily impact on
5 the lives of the beneficiaries of the trust.
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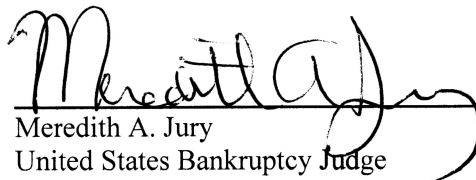
7 Perhaps this balance is better seen in light of what the
8 court could do or undo, depending on the appellate ruling. If the
9 court did not issue a stay, corporate control would go to MVT,
10 causing unknown changes to the operation of OCN and most certainly
11 having an impact on the daily lives of several individuals. If
12 the Ninth Circuit then reversed that ruling, causing control to be
13 revested in the Majority, the sudden switch back would have a
14 daily impact on everyone's lives, or at least so it seems. In
15 essence, unscrambling this egg would be most difficult. On the
16 other hand, with a stay in place, business would continue as usual
17 until the ruling is affirmed, at which time an orderly transition
18 to new controlling ownership could take place. These factors
19 overwhelmingly favor issuance of a stay.
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21 The court perceives no public interest in this private party
22 (largely family) dispute and therefore, finds that factor is
23 neutral.
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CONCLUSION

Based on the analysis above, the court will issuance a stay
pending appeal.

Date: June 16, 2017


Meredith A. Jury
United States Bankruptcy Judge